No. 94-1511

In The

Supreme Court of the United States

October Term, 1995

SAMUEL LEWIS, et al.,

Petitioners,

v.

FLETCHER CASEY, JR., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, and THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM IN SUPPORT OF RESPONDENTS

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The above-mentioned *amici curiae* respectfully submit this brief in support of affirmance of the judgment below of the United States Court of Appeals for the Ninth Circuit. Pursuant to Rule 37.2, all parties to this action have consented in writing to the above-mentioned *amici curiae* participating in this matter.

INTEREST OF *AMICI CURIAE*

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national non-profit civil

rights organization with principal offices located in Los Angeles, California. MALDEF's chief objective is to advance and protect the rights of Latinos living throughout the United States, through activities such as litigation and public education.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") is a national non-profit civil rights organization with principal offices located in New York, New York. PRLDEF's principal objective is to advance and protect the rights of Latinos living throughout the United States, through activities such as litigation and public education.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit organization whose affiliates are the Asian Law Caucus, located in San Francisco, California, the Asian Pacific American Legal Center, located in Los Angeles, California, and the Asian American Legal Defense Fund, located in New York, New York. NAPALC's mission is to advance and protect the legal and civil rights of the nation's 7.3 million Asian Pacific Americans through litigation, advocacy, public education, and public policy development.

SUMMARY OF THE ARGUMENT

This brief is submitted on behalf of the above-mentioned *amici curiae* in support of affirmance of the judgment of the Ninth Circuit Court of Appeals. The above *amici* submit this brief in support of the broad position advanced by the Respondents, but will confine their arguments to the specific question of whether the Ninth

Circuit should be affirmed as to its holding that the Arizona prison system failed to provide "meaningful access to the courts" to non-English-speaking inmates.

The necessity of erecting and operating prisons in a well-ordered society carries with it certain obligations when that society calls itself a constitutional democracy interested in protecting citizens from unlawful deprivations of liberty. Since at least 1941, the Court has consistently held that among these obligations is the duty to provide inmates with open and meaningful access to the judicial system. *See Ex parte Hull*, 312 U.S. 546 (1941). This obligation includes not only the duty to refrain from hindering an inmate's access to the courthouse doors, *see, e.g., Burns v. Ohio*, 360 U.S. 252 (1959), but also certain *affirmative* duties to enable prisoners to prepare and file minimally adequate writs and other pleadings. *See Bounds v. Smith*, 430 U.S. 817 (1977).

With an awareness of the impediments prisoners face in presenting proper claims to the courts for consideration, the Court in *Bounds* made clear that prisons must take affirmative steps to ensure that a prisoner's access to the courts is no less meaningful than the access of those who live beyond the prison walls. Thus, the Court laid down the now-settled rule that in order to protect an inmate's "fundamental constitutional right of access to the courts," prisons must at a minimum either "provid[e] prisoners with adequate law libraries" or furnish inmates with "adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 829.

In cases involving inmates who neither speak nor read English, the Circuit Courts have unanimously interpreted *Bounds* as requiring prisons to do more than merely supply books to them, for the obvious reason that "[a] book and a library are of no use, in and of themselves, to a prisoner who cannot read." *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855-56 (9th Cir. 1985). Since *Bounds* guarantees every inmate access to the courts that is meaningful, a prison's obligations to non-English-speaking inmates cannot be satisfied when it provides them with physical access to books they cannot read. Thus, the Circuit Courts have unanimously concluded that for these inmates, prisons must ensure reasonable access to individuals capable of either rendering the law library useful to them, or assisting them directly in preparing legal documents. *See, e.g., Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992); *Valentine v. Beyer*, 850 F.2d 951 (3d Cir. 1988); *Battle v. Anderson*, 614 F.2d 251, 255 (10th Cir. 1980).

In this case, the Petitioners urge the Court to sweep away this sensible and appropriate precedent, without providing any good reason for doing so. Petitioners seek this result, first, by grossly mischaracterizing the factual findings that undergird the conclusion below that Arizona's prison system failed to meet the threshold of "meaningful access" under *Bounds*. For example, Petitioners repeatedly assert that Arizona's non-English-speaking inmates "have physical access to excellent libraries *plus* help from legal assistants and law clerks." (Pet. Brf. at 35.) However, the District Court's conclusion that non-English-speaking inmates were denied "meaningful access" under *Bounds* is couched upon precisely the opposite factual finding: that many of these inmates

only have limited physical access to a law library, and do *not* receive help from legal assistants and law clerks. *See Casey v. Lewis*, 834 F. Supp. 1553, 1558-1560 (D. Ariz. 1992).

Stripped of these efforts to rewrite the factual findings below, the Petitioners' argument boils down to the claim that the Constitution requires prisons to do nothing more than provide non-English-speaking prisoners with physical access to the bare essentials of a law library. A prison's affirmative duties to these inmates are extremely limited, they assert. According to Petitioners, so long as non-English-speaking prisoners have physical access to a law library, and so long as the prisons do nothing to prevent communications among inmates, access to the courts for these inmates is *per se* "meaningful" under the Constitution. To require prisons to do anything more would be to place non-English-speaking inmates in a superior position relative to their non-institutionalized counterparts.

We strongly urge the Court to decline the Petitioners' invitation to reverse the Ninth Circuit on this question, and thereby disrupt the settled precedent in the Circuits as to the guarantee of "meaningful access" for non-English-speaking inmates. To inmates who neither speak nor read English, physical access to a law library is a fruitless privilege. A law library cannot possibly enable an inmate to prepare minimally adequate writs and pleadings if the inmate lacks the ability to decipher English text. Where, as here, these inmates lack reasonable access to trained bilingual assistants, access to the courts cannot be said to be any more meaningful than if the prisons provided them with no library at all.

The position advanced by the Petitioners is inconsistent, furthermore, with cases in other contexts in which the Court has held that the inability to communicate in English is not an adequate basis for denying individuals access to rights and privileges arising under federal law. *See Lau v. Nichols*, 414 U.S. 563 (1974). The "meaningfulness" of an inmate's access to the courts should not depend on his ability to read books written in English. If the purpose behind "meaningful access" is to enable inmates to properly present claims for consideration, then it makes little sense to inhibit the access of a significant subset of inmates on the basis of a characteristic having nothing whatsoever to do with the merits of their potential claims.

It is true, as Petitioners and their *amici* observe, that the Ninth Circuit's holding in this case places Arizona's prisons under an "affirmative" obligation to furnish bilingual assistance to non-English-speaking inmates. Constitutional claims are not invalid, however, simply because they would impose obligations on government that can be described as "affirmative" or "positive." *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Indeed, to say that government has no affirmative duties in this particular area is to deny the essential holding of *Bounds*, in which the Court imposed the very kind of affirmative obligations that the Petitioners here insist do not exist in the Constitution. The question here is thus not whether the obligation recognized by the Ninth Circuit is "affirmative" or "negative," but whether that obligation, affirmative or not, is logically and reasonably suggested by the reasoning of *Bounds*.

The Petitioners argue, furthermore, that the decision below is incorrect because it would place prison inmates in a superior position vis-a-vis their non-institutionalized counterparts, who are forced to use their own resources to overcome the language barrier. Here again the Petitioners are incorrect. It cannot seriously be argued that inmates who cannot read or speak English are in an equal position to their counterparts in society simply because they have physical access to a law library. Inmates have no practical access to the individuals and organizations that free persons ordinarily rely on for help in overcoming the hindrance of language, such as friends, relatives, and legal service organizations. Indeed, the provision of bilingual assistance to these inmates can be viewed as an effort to *approximate*, but in no way *surpass*, the much wider array of resources available to non-English-speaking persons who live outside the prison walls. By suggesting otherwise, Petitioners vastly understate the isolation experienced by inmates in general, and non-English-speaking inmates in particular.

Finally, the Petitioners argue that the remedy employed by the District Court in this instance was improper because each aspect of the injunction was not supported by a specific corresponding constitutional violation. Nowhere is this argument more obviously incorrect than in its application to the trial court's treatment of non-English-speaking inmates. In that context, the trial court made a direct, specific finding that Arizona's prisons denied non-English-speaking inmates meaningful access to the courts. On the basis of its finding of this specific constitutional violation, the Court directed Arizona's prisons to take affirmative steps toward increasing

the numbers of trained bilingual inmates available to assist those who cannot speak English. *See Casey*, 43 F.3d 1261, 1267 (9th Cir. 1994). Thus, this aspect of the District Court's order is plainly addressed to a specific constitutional violation, in precisely the manner that Petitioners claim is lacking.

For all of these reasons, the above-referenced *amici* respectfully request that the Court affirm the judgment below.

ARGUMENT

I. THE COURT SHOULD DISREGARD THE PETITIONERS' EFFORTS TO REWRITE THE DISTRICT COURT'S FACTUAL FINDING THAT MANY NON-ENGLISH-SPEAKING INMATES ONLY HAVE LIMITED PHYSICAL ACCESS TO LAW LIBRARIES.

In support of their position, Petitioners attempt to paint a cheerful picture of life as a non-English-speaking inmate in the Arizona prison system. Petitioners would lead us to believe that these inmates enjoy the same degree of access to the courts as those who live beyond the prison walls. Not only do non-English-speaking inmates have access to law libraries that are "excellent," but they also receive "help from legal assistants and law clerks." (Pet. Brf. at 35.) The Ninth Circuit's decision should be reversed, the Petitioners argue, because it would grant "convicted criminals . . . far greater legal resources in pursuing civil actions than law-abiding citizens." *Id.*

By mischaracterizing the District Court's factual findings in this way, the Petitioners have attempted to avoid the far more difficult task of directly defending a prison system that *only* provides many of its non-English-speaking inmates with access to law books they cannot read. Rather than directly defend a system of that kind, the Petitioners simply assume a different set of facts. If, after all, one assumes that Arizona's prisons do in fact provide these inmates *both* with physical access to a law library *and* assistance from trained (and, presumably, bilingual) legal assistants, then how could Arizona's prison system possibly fail to meet the requirements of *Bounds*?

The answer is that Petitioners' factual assertions are directly contrary to the findings of fact reached by the District Court, and which served as the factual predicate to its conclusion that Arizona's treatment of non-English-speaking inmates fell short of *Bounds*. For example, although it is true that Arizona provides libraries to the general inmate population, the District Court concluded that these libraries are anything but "excellent." Many of the libraries, the Court found, are marred by "missing or damaged legal materials" caused by "inadequate staffing." *Casey*, 834 F. Supp. at 1556. And for many inmates, whether English-speaking or not, physical access is restricted in ways that seriously undermine their ability to make use of the library. In several of the prisons, inmates are prohibited from browsing the shelves; in order to retrieve a book, they must submit requests to prison guards or "untrained prisoner law clerks" to retrieve specifically designated books. *Casey*, 834 F. Supp. at 1555-1556. These prisoner law clerks, selected from among the general inmate population, may only assist

inmates by performing the physical task of "giving them the requested material" from the library, and are not available to provide substantive assistance of any kind, since they lack any training to do so. *Id.* at 1559.

Each of the prisons operate a voluntary "legal assistance" program, through which limited numbers of trained inmates are made available to help fellow inmates "draft pleadings and do other legal work." *Casey*, 834 F. Supp. at 1559. The problem, however, is that "[t]here are an insufficient number of legal assistants available to assist prisoners who need legal assistance." *Id.* Despite the availability of these legal assistants to *some* inmates, many Arizona prisoners – whether English-speaking or not – have *no* practical ability to obtain assistance under this program, and therefore are provided nothing more than limited physical access to the libraries. Thus, "[t]he vast majority of adult prisoners incarcerated by ADOC have no adequate means to research the law, crystallize their issues, present their papers in a meaningful fashion, and get them filed in court." *Id.* at 1558.

For inmates who cannot read or speak English, these inadequacies are seriously exacerbated by the paucity of legal assistants capable of speaking their language. Even though 14.5% of the inmates in Arizona's prisons do not speak English, Arizona does nothing to "ensure that law libraries or facilities have Spanish-speaking legal assistants or law clerks." *Id.* at 1560. As a result, Arizona's prisons either have no bilingual assistants at all, or too few to meet the demand. *Id.* As the District Court found, "[i]n many facilities there are no Spanish-speaking legal assistants and law clerks." *Id.* The only alternative for these inmates is to attempt to seek assistance from fellow

inmates who speak Spanish, but who are neither law clerks nor legal assistants. In many instances, however, "these prisoners are unable to comprehend and translate legal terminology," making reliance on them useless at best, or prejudicial at worst. *Id.* at 1560. Indeed, the lack of sufficient bilingual assistance has directly resulted in the dismissal of cases, or in the inability of non-English-speaking inmates to file legal actions. *Id.* at 1558. In sum, the conditions in the Arizona prison system have worked to effectively block non-English-speaking inmates' access to the courts.

In light of these factual findings, it is simply incorrect for Petitioners to assert that non-English-speaking inmates in Arizona's prisons have access to "excellent libraries *plus* help from legal assistants and law clerks." This assertion directly contradicts the express factual findings of the District Court: that these libraries are poor, not "excellent"; that there are insufficient numbers of legal assistants and law clerks to meet the demands of the general inmate population; that the few inmate legal assistants and law clerks who *are* available to the general inmate population are of *no* help to non-English-speaking inmates; and that these conditions have directly resulted in the loss of claims that may have otherwise been valid on the merits.

Needless to say, the findings of the District Court may not be questioned unless they can be shown to be clearly erroneous.[1] *See Guzman v. Pichirilo*, 369 U.S. 698,

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[1] Indeed, there is considerable authority for the proposition that the District Court's finding on the ultimate question of

701 (1962); *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960). Petitioners do not even attempt to make that claim, but endeavor nonetheless to cast a gloss over the record that directly contradicts the Court's express factual findings. The Court should disregard Petitioners' efforts to mischaracterize the record in this way. That record makes quite clear that Arizona's prisons have attempted to satisfy *Bounds* simply by making the bare essentials of a law library available to many of its inmates, even though a significant percentage of those inmates are wholly incapable of making use of that resource because they can neither speak nor read English.

"meaningfulness" is a question of fact, subject to the "clearly erroneous" standard of review. *See, e.g., Knop v. Johnson*, 977 F.2d 996, 999 (6th Cir. 1992) (applying the "clearly erroneous" standard of review to District Court's determination of "meaningfulness"); *Williams v. Lane*, 851 F.2d 867, 877 (7th Cir. 1988) (applying "clearly erroneous" standard to District Court's application of *Bounds*). Whether an inmate enjoys access to the courts that is "meaningful" is, as one court has commented, a "largely factual question" that requires inquiry of a factual nature into the extent and quality of an inmate's ability to prepare and file writs and pleadings. *Cepulonis v. Fair*, 732 F.2d 1, 4 (1st Cir. 1984). It is therefore appropriate to defer to the District Court's determinations on the ultimate question of meaningfulness under *Bounds*.

II. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT IN ORDER TO GUARANTEE "MEANINGFUL ACCESS TO THE COURTS" FOR NON-ENGLISH-SPEAKING INMATES, PRISONS MUST ENSURE ACCESS TO A LAW LIBRARY AS WELL AS BILINGUAL INDIVIDUALS CAPABLE OF ASSISTING THESE INMATES TO MAKE USE OF THAT RESOURCE.

Petitioners in this case ask the Court, in essence, to overturn a series of Circuit Court opinions holding that a prison's duties to non-English-speaking inmates under *Bounds* is not satisfied when it furnishes library books to them that they cannot read. In that specific context, these cases hold, prisons must furnish inmates with persons who are capable of either assisting them make sense of these library materials, or of enabling them directly to prepare minimally adequate writs and other pleadings. The Court is here asked to disturb this reasoned application of the principles set forth in *Bounds*, but the Petitioners have failed to identify any good reason for doing so. This Court should therefore reject the Petitioners' efforts to transform *Bounds* into a useless constitutional rule for those inmates whose ability to help themselves is profoundly undermined by their isolation from the outside world and their inability to either speak or read the English language.

A. The Circuit Courts Have Uniformly Held that Prisons Cannot Satisfy *Bounds* Simply by Providing Non-English-Speaking Inmates with Physical Access to a Law Library.

The position that the Petitioners urge upon this Court is directly contrary to the caselaw in every Circuit that has directly commented on the proper application of *Bounds* to inmates who do not speak English. If the ultimate measure of constitutional adequacy is whether access to the courts is "meaningful," then it cannot be said that the establishment of a library is sufficient in itself to satisfy *Bounds* for all inmates. "That books would be of no use to the illiterate needs no discussion." *Hooks v. Wainwright*, 775 F.2d 1433, 1436 (11th Cir. 1985).

Every other Circuit that has commented on this question has reached the same result. *See Knop v. Johnson*, 977 F.2d 996, 1005 (6th Cir. 1992) ("[s]tanding alone, law libraries that are adequate for prisoners who know how to use them . . . are not adequate for prisoners who cannot read and write English"); *Valentine v. Beyer*, 850 F.2d 951, 957 (3d Cir. 1988) (noting that constitutional adequacy of library resources turned on whether illiterate and non-English-speaking inmates had access to paralegal assistance); *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855-56 (9th Cir. 1985) ("[a] book and a library are of no use, in and of themselves, to a prisoner who cannot read"); *Cruz v. Hauk*, 627 F.2d 710, 721 (5th Cir. 1980) ("[l]ibrary books . . . cannot provide access to the courts for those persons who do not speak English or who are illiterate"); *Battle v. Anderson*, 614 F.2d 251, 255 (10th Cir. 1980) (remanding for factual determination whether illiterate prisoners in fact had access to inmate

law clerks in addition to physical access to library); *accord Wade v. Kane*, 448 F. Supp. 678, 684 (E.D. Pa. 1978) ("it is obvious that a prison library . . . is insufficient to provide [meaningful] access for inmates who are illiterate").

In this way, the Circuits have had little difficulty coming to a consensus as to the basic standards trial courts are to apply in this circumstance. Providing a library to non-English-speaking inmates is insufficient in itself to meet the "touchstone" of meaningful access. *See id.* With that limit in mind, prisons may satisfy their obligation under *Bounds* in a variety of ways. One method is simply to opt for the second alternative enunciated in *Bounds* – namely, arranging for these inmates to have "adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 829; *see also Lindquist*, 776 F.2d at 855. Alternatively, prisons may provide some combination of access to a library *together* with access to persons capable of rendering those materials accessible to non-English-speaking inmates. *See Knop*, 977 F.2d at 1006. This objective can be accomplished with programs for training bilingual inmates to serve as paralegals or law clerks. *See id.* It can be achieved by the happenstance of voluntary organizations making suitable quasi-legal services available to these inmates. *See Valentine*, 850 F.2d at 956-957. And it can be achieved in any other way that prison officials can devise of assuring access to the courts that is "meaningful" under *Bounds*.

These objectives are tempered, of course, by considerations of practicality. Trial courts should certainly adhere to the Court's admonition to apply *Bounds* in the first instance with due deference to the choices of prison officials. *See Bounds*, 430 U.S. at 833-834. This purpose can

and often is accomplished by relying heavily on the proposals of prison officials in fashioning appropriate remedies. These remedies, furthermore, must take into account the practical demands of operating a prison system. *See Campbell v. Miller*, 787 F.2d 217, 229 (7th Cir. 1986). Thus, an inmate's right of access to the courts is not limitless. *See Cepulonis v. Fair*, 732 F.2d 1, 4 (1st Cir. 1984). And the effectuation of that right must occur with due regard for the prison's legitimate penological objectives, such as maintaining the peace and protecting the safety and welfare of prison officials as well as inmates. *See Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978).

In short, the Circuits have reached a coherent consensus as to the applicability of *Bounds* to non-English-speaking inmates. *Bounds* unquestionably requires prisons to afford non-English-speaking inmates with either access to persons trained in the law, or access to individuals capable of rendering the law library a useful resource for them. Of course, this requirement – as with all others under *Bounds* – must be carried out with a proper sensitivity to the limits of judicial power and the practical demands associated with operating a prison system.

B. The Court Should Affirm this Caselaw Because it Represents a Reasonable and Logical Application of the Principles Enunciated in *Bounds*.

Contrary to the position advanced by the Petitioners, there is no need for this Court to disrupt the settled caselaw discussed above. To pretend that it is constitutionally adequate to provide inmates with physical access

to books they cannot read is no different from claiming that it is adequate to establish a library for *literate* inmates but deny them physical access to the stacks. The Circuits have all quite sensibly held that it is not enough for prisons to possess books but deny the general inmate population physical access to them, or so restrict that access as to transform the library into the equivalent of a vestigial organ. *See, e.g., Williams*, 584 F.2d at 1339 (commenting that it is insufficient to "simply provid[e] a prisoner with books in his cell" rather than permit the prisoner access to the library itself); *Kendrick v. Bland*, 586 F. Supp. 1536, 1551 (W.D. Ky. 1984).

This precedent is wholly consistent with caselaw recognizing that the inability to communicate in English is an unacceptable reason for denying a person access to basic rights and privileges under federal law. For example, in the context of public education, the Court has held that the right to participate in federally-funded educational programs cannot be satisfied for non-English-speaking students "merely by providing students with the same facilities, textbooks, teachers, and curriculum." *Lau v. Nichols*, 414 U.S. 563, 566 (1974). Without providing an adequate means for these students to understand what is being taught, "those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful." *Id.*

So too, in determining the adequacy of a non-English-speaking defendant's right to participate in the trial against him, the courts have properly held that the government must provide the assistance of a translator. It is a "nearly self-evident proposition," one court has

observed, that a defendant who cannot speak or understand English enjoys "a right to have his trial proceedings translated" for him so as to enable him to "participate effectively in his own defense." *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970). There is no question, therefore, that government is obligated to furnish a translator to a defendant who cannot otherwise understand the proceedings due to impediments of language. *See United States v. Lam Kwong-Wah*, 924 F.2d 298, 309 (D.C. Cir. 1991); *United States v. Gallegos-Torres*, 841 F.2d 240, 242 (8th Cir. 1988).

The courts have similarly held that the adequacy of a non-English-speaking citizen's right to vote is measured by the meaningfulness of the act itself, taking into account the citizen's inability to understand English. "[T]he right to vote," the courts have held, "encompasses the right to an *effective* vote." *Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 580 (7th Cir. 1973) (emphasis added). Thus, the courts have held that government is required to furnish translated ballots to voters who are unable to comprehend English. *See id.* at 580; *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974).

In each of these contexts, the courts have rejected the argument that strict equality of treatment dispenses with government's obligation to guarantee a person's rights and privileges. Rather, the courts have understood that government is required to do more; that it is required to take steps to ensure that a non-English-speaking person has the opportunity to exercise these rights in a manner that is *meaningful* in light of his or her inability to communicate in the predominant language of the nation. This concern is doubly fortified by the fact that language

ability is a characteristic that is closely connected with ethnicity, which, of course, may never serve as a basis for treating persons unequally. *See, e.g., Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1925).

With the proper focus on the end product of "meaningfulness," then, *Bounds* similarly requires prisons to do more than merely furnish non-English-speaking inmates with a library that is sufficient for inmates who comprehend English. The right of access by an inmate who cannot read English is made no more meaningful by the provision of a law library than by the provision of pencils without paper, or envelopes without stamps. The physical availability of a law library simply makes little difference to an inmate who cannot read or speak English. To claim that the right of access for these inmates is rendered "meaningful" by the provision of a library is thus to claim that courts should take no account of the impediments of language. But as we have seen, the courts have long held that the government is obligated in many similar contexts to accommodate the impediments of language in ensuring the meaningful exercise of federal rights.[2]

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[2] The failure to provide bilingual assistance to non-English-speaking inmates may also violate Title VI, 42 U.S.C. § 2000d and its regulations. The Department of Justice's Title VI regulations require that the methods of administration of a program, in this case the court access program, not "have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color or national origin." 28 CFR § 42.104(b)(2). Justice Department regulations specifically require that bilingual services be provided: "Where a significant number or proportion of the population eligible to be served . . . by a federally assisted

Nor is it possible for Petitioners to seriously maintain that providing a library to inmates who *can* make sense of those materials somehow absolves prisons of the constitutional obligation to ensure meaningful access for inmates who cannot. The Court was clear in *Bounds* that the right of meaningful access to the courts is not a right that is satisfied when a majority, or some other subset of the inmate population enjoys it. It is, rather, a right that is enjoyed by each inmate, apart from whether other inmates happen to have it. As the Court made clear in *Bounds*, states are affirmatively obligated "to assure *all* prisoners meaningful access to the courts." *Bounds*, 430 U.S. at 824 (emphasis added).

To say, then, that providing a library to the literate inmate population is sufficient under *Bounds* is to claim that non-English-speaking inmates enjoy "meaningful access" because they can rely on other untrained inmates to help them reduce their claims to competent legal writings. But there is no evidence in this case that non-English-speaking inmates receive competent bilingual assistance from their fellow inmates in this way. To the contrary, the District Court found that non-English-speaking inmates did *not* receive adequate assistance from fellow inmates. *See Casey*, 834 F. Supp. at 1560. The fact that non-English-speaking inmates may be permitted to *seek* competent bilingual assistance from other inmates

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program . . . needs service or information in a language other than English in order to effectively . . . participate in the program, the recipient shall take reasonable steps . . . to provide information in appropriate languages to such persons." 28 CFR § 42.405(d)(1).

does not mean that they in fact *receive* that assistance. This is not to deny the theoretical possibility that, in some prisons, inmates may in fact benefit from the fortuity of sufficient numbers of fellow inmates who are willing *and* capable of providing competent assistance. However, such matters are simply not amenable to generalizations; whether non-English-speaking inmates receive assistance of the kind that renders their access meaningful is a question of fact, to be determined on a case-by-case basis at the District Court level.

If, in short, *Bounds* guarantees every inmate meaningful access to the courts, then the Court should conclude that it is insufficient to furnish non-English-speaking inmates with books they have no use for, "legal assistants" they cannot communicate with, and fellow inmates they cannot place their confidence in. Rather, as the Circuit Courts have uniformly held, prisons must ensure that these inmates have access to bilingual individuals who can perform the limited function of assisting them "to reduce their stories to intelligible written pleadings." *Knop v. Johnson*, 977 F.2d 996, 1006 (6th Cir. 1992).

C. Petitioners' *Amici* are Incorrect to Suggest that *Bounds* Places no Affirmative Obligations on Prisons to Ensure Meaningful Access.

As certain of Petitioners' *amici* point out, it is true, to be sure, that the provision of bilingual assistance to these inmates amounts to an obligation that is "affirmative." (*See* Washington Legal Found. Br. of *Amici Curiae* at 3-8.) However, the fact that this obligation can be described as

affirmative is not in itself an argument against recognizing the obligation as a constitutional one. This Court has long recognized, in areas too numerous to catalogue here, that many of the Constitution's provisions place affirmative obligations on government. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (states have affirmative obligation to furnish indigent defendants with state-subsidized counsel); *Gallegos-Torres*, 841 F.2d at 242 (states have affirmative obligation to furnish interpreter to non-English speaking defendant); *Miranda*, 384 U.S. 436 (1966) (police officers have affirmative obligations to advise arrestee of rights).

The imposition of affirmative obligations arises with frequency in the context of a District Court's efforts to fashion effective remedial measures designed to cure unconstitutional conduct. *See United States v. Fordice*, 505 U.S. ___, 112 S. Ct. 2727 (1992) (state is under obligation to take affirmative steps to reverse the effect of a segregated public university system). These cases include those involving efforts to bring prison systems into line with basic constitutional standards. *See Bell v. Wolfish*, 441 U.S. 520 (1979); *Brogsdale v. Barry*, 926 F.2d 1184 (D.C. Cir. 1991); *Ryan v. Burlington County*, 674 F. Supp. 464 (D.N.J. 1987).

Indeed, for Petitioner's *amici* to argue that prisons owe no affirmative obligations to inmates is to argue that *Bounds* itself was wrongly decided, for the Court in that case expressly rejected that argument. In *Bounds*, the Court was directly confronted with the invitation to adopt the very distinction urged upon the Court today by Petitioner's *amici*. There, the prison officials argued that "as long as inmate communications on legal problems are

not restricted, there is no further legal obligation to expend state funds to implement affirmatively the right of access." *Bounds*, 430 U.S at 824. The Court rejected that argument, *see id.* ("[t]his argument misreads the cases"), noting that the relevant caselaw already imposed affirmative obligations on prisons for the specific purpose of guaranteeing an inmate's access to the courts. *See id.* at 825 ("our decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access").

In rejecting this argument, the Court made clear that the inquiry is not whether the obligation is positive or negative, but "whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental rights." *Bounds*, 430 U.S. at 826. Thus, it begs the central question in this case for Petitioners' *amici* to characterize the obligation claimed here as "affirmative." The question that they have failed to answer persuasively – and the question that is dispositive under *Bounds* – is whether that obligation is logically compelled by the "touchstone" of meaningful access.

D. The Result Below Will Not Place Non-English-Speaking Inmates in a Superior Position Vis-a-Vis Non-Institutionalized Counterparts.

At the heart of Petitioners' criticism of the Ninth Circuit is the claim that the result below will somehow place the affected inmates in a *superior* position in comparison to their counterparts in free society. (*See* Pet. Brf. at 35.) Whatever the boundaries of an inmate's right of

access, Petitioners claim, the Constitution cannot be read in such a way as to place individuals convicted of crimes and serving their sentences in any better position than if they had never been convicted of a crime. Because the Ninth Circuit's holding would impose upon prisons the obligation to provide illiterate and non-English-speaking inmates with assistance that free persons do not have access to, that decision must be incorrect.

This argument is flawed, in part because of the fatal weakness of its premise. It is simply not true that the Constitution *never* grants inmates or criminal defendants rights that are otherwise unavailable to individuals whose conduct has kept them clear of troubles with the law. A civil litigant has no right to state-subsidized counsel, *see Mallard v. United States Dist. Court for S. Dist. of Iowa*, 490 U.S. 296 (1989), but a criminal defendant unquestionably does. *See Gideon*, 372 U.S. at 335. Government is under no obligation to furnish free persons with food, clothing, or shelter, but it must provide these bare essentials to individuals confined in prison. *See Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977); *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977). Prisoners are entitled as a matter of constitutional right to physical protection from other prisoners; no such constitutional right has ever been recognized as to persons residing in free society. *See Farmer v. Brennan*, 511 U.S. ___, 114 S. Ct. 1970 (1994).

Indeed, in *Bounds* itself, the Court extended to prisoners a constitutional right not otherwise available to free persons. Although all persons enjoy the right to open and unhindered access to the courts, the Court has never held or implied that this right imposes an affirmative obligation on government to furnish state-subsidized law

libraries to them, or if one is not available, to furnish persons adequately trained in the law. And yet the Court was willing to grant this right to inmates, in light of the obvious and unique difficulties associated with participating in the judicial process from the vantage point of a prison cell.

In any event, the deeper problem with Petitioners' position is that it grossly misunderstands the unique impediments confronted by non-English-speaking inmates in presenting claims to the courts. It is simply not true that these inmates will be placed in a better or even roughly equal position vis-a-vis their non-institutionalized counterparts by furnishing them access to trained bilingual inmates. It is difficult to overstate the degree of isolation experienced by prisoners in general, not to mention those who cannot understand or read English. An inmate confined to prison is cut off from the outside world, and from the individuals most inclined to provide assistance to him. While contact with visitors is permitted, it is severely restricted. Inmates are often held in institutions located far from home, making regular visits from family and friends impractical at best, and impossible at worst.

Unlike his non-institutionalized counterpart, the non-English-speaking inmate cannot turn to bilingual relatives and friends for help in negotiating the shelves of a law library. He is unable to earn an income sufficient to enable him to retain the services of a bilingual lawyer, or of a translator. And he cannot seek assistance from non-profit legal organizations that have bilingual attorneys, paralegals, or other staff members who are capable of assisting him to make sense of the legal system. In this

way, providing trained bilingual assistance to these inmates would amount to an effort to *approximate* conditions beyond the prison walls, not to surpass them, as Petitioners suggest.

E. The Remedy Afforded by the District Court as to Non-English-Speaking Inmates Was Designed to Address a Specific Constitutional Violation.

Finally, the Petitioners mount a broad-based attack against the methods utilized by the trial court in this case for effectuating the constitutional principles set forth in *Bounds*. However, Petitioners' attack upon the District Court's remedial measures is most obviously flawed in connection with the Court's treatment of non-English-speaking inmates. The Petitioners' central criticism of the District Court's injunction is that it fails to tie each of the specific remedial measures to a corresponding, specific constitutional violation. "[T]he particular components of the injunction," Petitioners complain, "are overbroad and not adequately supported by any finding of a constitutional violation." (Pet. Brf. at 39.)

In the context of non-English-speaking inmates, however, Petitioners utterly fail to demonstrate the absence of a nexus between the violation and the remedy. Petitioners claim that there is no such nexus *not* by demonstrating a lack of fit between the constitutional harm (the denial of meaningful access to the courts) and the remedy (ordering the prisons to increase bilingual assistance to non-English-speaking inmates). Rather, Petitioners make this argument by *repeating* their claim that there has been no

underlying constitutional violation. (Pet. Brf. at 45 (arguing that the District Court's remedy was inappropriate because Arizona's program "fulfills constitutional requirements")).

The Petitioners abandon any efforts to criticize the fit between the violation and the remedy in this context because, under the very cases they rely on, the requirement of "narrow tailoring" is amply satisfied. Petitioners are correct to observe that in evaluating the appropriateness of a judicial remedy, the Court must determine whether that remedy "serv[es] as a proper means to the end of restoring the victims of [unconstitutional] conduct to the position they would have occupied in the absence of that conduct." *Missouri v. Jenkins*, 515 U.S. ___, 115 S. Ct. 2038, 2049 (1995). Put differently, "[t]he remedy must therefore be related to 'the *condition* alleged to offend the Constitution.' " *Milliken v. Bradley*, 433 U.S. 267, 280-281 (1977) (*Milliken II*) (citations omitted).

Petitioners fail to demonstrate in what sense the District Court's remedy as to non-English-speaking inmates is unrelated to the Court's express finding that they have been denied constitutionally adequate access to the courts. The District Court found that Arizona's failure to supply bilingual assistance to non-English-speaking inmates resulted in the lack of meaningful access to the courts. Thus, there can be no question that the corresponding remedy was appropriate. To remedy this wrong, the Court merely directed Arizona to furnish sufficient numbers of bilingual law clerks to meet demand, and to take "[p]articular steps . . . to locate and train bilingual prisoners to be Legal Assistants." *Casey*, 43 F. Supp. at 1274, 1277. At a minimum, the Court ordered,

"schedules and notices relating to all institutional legal services and programs [must] be made available in Spanish and English." *Id.*

These remedies are designed to directly remedy the specific constitutional harms found to exist as a result of the failure of Arizona's prisons to furnish bilingual assistance to non-English-speaking inmates. For these reasons, the remedy issued by the District Court was appropriately tailored to the specific constitutional harm found to exist as to non-English-speaking inmates.

CONCLUSION

For all of the reasons set forth above, we respectfully urge this Court to affirm the judgment below.

Respectfully submitted,

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